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December 1, 2008

AOR 2008-20

Thomasenia P. Duncan
Office of General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463
By email & 1st Class Mail

Re: Advisory Opinion Request

2008 DEC 1
P 2:09
OFFICE OF GENERAL COUNSEL
FEDERAL ELECTION COMMISSION

Dear Ms. Duncan,

On behalf of the National Right to Life Committee, Inc. ("NRLC"), we respectfully request an Advisory Opinion ("AO") from the Federal Election Commission ("FEC"), pursuant to 2 U.S.C. 437f of the Federal Election Campaign Act ("FECA"). NRLC seeks guidance as to whether it may reimburse its separate segregated fund, National Right to Life Political Action Committee ("NRLPAC"), for the costs of broadcasting a radio advertisement that was declared by the FEC, *see* AO 2008-15, not to be subject to the corporate prohibition at 2 U.S.C. § 441b ("Prohibition").

Facts

On September 26, 2008, NRLC submitted AOR 2008-15, in which NRLC "request[ed] an immediate response" (or within the 20 days provided in 11 C.F.R. § 112.4(b) for candidates) as to whether NRLC would be prohibited from broadcasting two radio advertisements (*Apology #1* and *Apology #2*). The reason for the haste, of course, was the fact that public interest in this issue was at a peak prior to the November 4 election, so NRLC "want[ed] to begin to run its ads immediately." AOR 2008-15 at 4. NRLC added the following note regarding urgency:

NRLC recognizes that 11 C.F.R. § 112.4(b) only provides for a shorter response period when the requester is a "candidate" and NRLC is not a candi-

date. But it is inexcusable that this special benefit afforded to politicians should not also be afforded to private citizens and citizen groups.

AOR 2008-15 at 4.

The Supreme Court has placed some reliance on the availability of advisory opinions to mitigate burdens on free speech and association and to mitigate vagueness concerns. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003). And in *Citizens United v. FEC*, a case now on appeal in the United States Supreme Court (No. 08-105), the FEC argued against a preliminary injunction to protect ads that also met the statutory “electioneering communication” definition on the basis that advisory opinions were available and could be obtained on an expedited basis: “When necessary, the Commission expedites its response to an urgent request for an advisory opinion, providing an answer in well under sixty days.” Defendant Federal Election Commission’s Memorandum in Opposition to Plaintiff’s Second Motion for Preliminary Injunction at 10 n.8, *Citizens United v. FEC*, No. 1:07-cv-2240-RCL (D.D.C. Jan. 8, 2008) (Doc. 33 on PACER).

The FEC set the AOR for its October 23, 2008 open meeting.

In preparation for the October 23 meeting, the General Counsel submitted a draft AO stating that *Apology #1* was not subject to the Prohibition, either as an independent expenditure or an impermissible electioneering communication. *See* Agenda Doc. 08-32. The General Counsel’s draft AO identified *Apology #2* as containing express advocacy. Chairman McGahn submitted a draft AO stating that neither ad was subject to the Prohibition. *See* Agenda Doc. 08-32-A.

At the October 23 meeting, comments by the commissioners indicated that three commissioners would have found that NRLC could permissibly broadcast both ads, Transcript (“TS”)¹ at 19-20, 22, two commissioners would have followed the General Counsel’s Report by finding *Apology #1* permissible and *Apology #2* impermissible, TS at 6, 28, and one commissioner would have found both ads impermissible. TS at 26-27. *See also* TS at 30-31 (votes).

Although there were apparently five commissioners (and at least the requisite four commissioners necessary for a decision) who indicated that they would have found *Apology #1* permissible, the FEC did not immediately issue an AO permitting NRLC to pay for that ad. Because an AO was not immediately issued permitting NRLC to broadcast *Apology #1*, NRLC’s registered political committee NRLPAC began broadcasting it instead, starting on October 28.²

¹A transcript of the open meeting is appended.

²The version of *Apology #1* broadcast by NRLPAC slightly differs from the script included in AOR 2008-15. Instead of including the actual clip of Barack Obama’s statement, NRLPAC simply read the quote, and NRLPAC removed the reference to a specific journalist in the first paragraph. These changes do not alter the substance of *Apology #1* in any legally significant way for purposes of this AOR. The complete text of *Apology #1* as broadcast by NRLPAC is as follows:

On November 24, the FEC approved AO 2008-15, which found *Apology #1* permissible for NRLC to broadcast and reached no conclusion on *Apology #2*. Between October 28, when NRLPAC began broadcasting *Apology #1*, and November 24, when AO 2008-15 was finally issued, NRLPAC spent \$69,271.56 broadcasting *Apology # 1*.

Discussion

The FEC's AO 2008-15 means that *Apology #1* was in fact permissible when NRLC requested the opinion on September 26 (when the AO was requested), on October 22 (when the General Counsel submitted her draft AO), and on October 23 (when sufficient commissioners to issue an AO indicated that they believed the ad to be permissible). But NRLC could not rely on the General Counsel's initial draft (which was not approved in any event) or on the positions indicated at the October 23 meeting (especially since there were indications of attempted negotiations as to NRLC's First Amendment rights), TS 31-32, because only an official AO provides legal protection. *See* 2 U.S.C. § 437f(c).

So an issue-advocacy citizen group and its members were deprived of protection by the FEC

Male: The following is paid for by National Right to Life PAC at nrlpac.org. Not authorized by any candidate or candidate's committee, NRLPAC is responsible for the content of this advertising.

Female 1: In August, National Right to Life released documents proving that in 2003, Barack Obama was responsible for killing a bill to provide care and protection for babies who are born alive after abortions, *and* that he later misrepresented the bill's content.

Male: When Obama was asked about National Right to Life's charges in a televised interview, he replied: (quote) "... I hate to say that people are lying, but here's a situation where folks are lying."

Female 1: We challenged Obama to admit that the documents are genuine, and admit to his previous misrepresentations. FactCheck[dot]org then investigated, and concluded:

Female 2: (clinical, detached tone): "Obama's claim is wrong . . . The documents . . . support the group's claims that Obama is misrepresenting the contents of [Senate Bill] 1082."

Female 1: Was Obama afraid that the public would learn about his extreme position – that he opposed merely defining *every* baby born alive after an abortion as deserving of protection?

Will Obama now apologize for calling us liars when we were the ones *telling the truth*?

for their right to engage in First Amendment-protected, core-political, amplified speech, *see Buckley v. Valeo*, 424 U.S. 1, 22 (1976), at the very time when the public's interest in NRLC's issue was at its peak. NRLC could not safely speak unless it was willing to venture forth without protection in the face of two regulations, 11 C.F.R. §§ 100.22(b) and 114.15, that are so vague that the FEC Commissioners, themselves, could not readily or unanimously agree as to the regulations' applicability.

Moreover, the Commission seemed unable, or unwilling, to apply the constitutional mandate that "in a debatable case, the tie is resolved in favor of protecting speech." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2669 n.7 (2007) ("*WRTL I*"). This mandate ought to be applied by the Commission so that where the Commissioners split evenly on whether a communication is prohibited, the communication is recognized as permissible. Similarly, because § 100.22(b) turns on whether "reasonable minds could . . . differ" and § 114.15 turns on whether a "communication is susceptible of no reasonable interpretation other than as an appeal to vote," and because Commissioners nominated by the President and confirmed by the Senate to a federal agency specializing in campaign-finance issues surely must be assumed to be reasonable, where commissioners "differ" on whether there is an appeal to vote in a communication then that communication should not be deemed express advocacy or an impermissible electioneering communication.

These constitutional problems, coupled with the delay in processing AOs at times when public speech on public issues is most pressing, requires a new approach. While resolving all of these problems is beyond this AOR, the facts of this request offer a good place to begin.

NRLC believes that in a situation where a connected organization is able and chooses to fund communications through a separate segregated fund as a legal precaution while it awaits the outcome of a requested AO near an election, the connected organization should be able to reimburse its separate segregated fund for its disbursements to broadcast the ad if it is recognized in an AO as permissible. The ability of NRLPAC to speak was no substitute for NRLC itself speaking. *See, e.g., WRTL II*, 127 S. Ct. at 2671 n.9 (PAC alternative not adequate substitute). And since federal funds are much more difficult to raise than other funds, connected organizations and SSFs rightly prefer using scarce federal funds only for communications for which the requirement of using federal funds is constitutionally justified.

The FEC could approach this in at least two ways. First, it might interpret the exclusion for administrative expenses, 2 U.S.C. § 441b(b)(2)(C), from the prohibition on "contribution or expenditure" and "any applicable electioneering communication," 2 U.S.C. § 441b(b)(2), to permit reimbursement for such activity where the activity was undertaken as a legal precaution for the connected organization while it awaits a response to an advisory opinion requested near an election. A legitimate "administration" function, 11 C.F.R. § 114.5(b), is the proper payment of obligations and the allocation of funding to comply with constitutional and legal requirements. This approach provides the advantage of fitting the new reimbursement potential into an existing body of law. For example, 11 C.F.R. § 114.15(b)(3) provides for the reimbursement of adminis-

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trative expenses by a connected organization to its SSF within 30 days. And AO 1983-22 recognized that the FEC has authority to permit reimbursement beyond that time period where an entity had requested an AO within the 30-day period. This is, of course, analogous to the present situation with NRLC and NRLPAC and the present AOR.

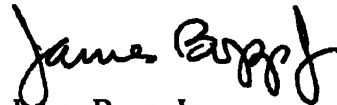
Second, the FEC might simply recognize that 2 U.S.C. § 441b(a) prohibits corporate independent expenditures and “applicable electioneering communication[s],” not expenditures for permissible communications. So, where communications are paid for by an SSF as a legal precaution for the connected organization while it awaits a response to an advisory opinion requested near an election, there is no justification for forbidding the reimbursement. Specifically, in such a situation there is no corporate corruption concern that would justify the government from forbidding the reimbursement, so that First Amendment liberties should prevail. So the FEC could simply issue the present AO recognizing in this circumstance the permissibility of the reimbursement. The Commission may then wish to engage in a rulemaking on the subject to explore further the constitutionally- and legally-permissible boundaries for allowing such reimbursements.

Question

Under these circumstances, may NRLC reimburse NRLPAC for the costs involved in broadcasting *Apology #1*?

Sincerely,

BOPP, COLESON & BOSTROM

A handwritten signature in black ink, appearing to read "James Bopp, Jr.", with a stylized, cursive script.

James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen

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AUDIOTAPE TRANSCRIPTION
from
FEC OPEN MEETING - OCTOBER 23, 2008

* * * * *

Taken for:
Bopp, Coleson & Bostrom
Kaylan Lytle Phillips
1 South Sixth Street
Terre Haute, Indiana 47807
812-232-2434

* * * * *

CROSSROADS COURT REPORTING
Renee R. Dobson, RMR
9733 Sable Ridge Lane
Terre Haute, IN 47802
812-299-0442

A P P E A R A N C E S

SPEAKERS:

Donald F. McGahn, II, Chairman

Steven T. Walther, Vice Chairman

Cynthia L. Bauerly, Commissioner

Caroline C. Hunter, Commissioner

Matthew S. Peterson, Commissioner

Ellen L. Weintraub, Commissioner

Jonathan Levin, General Counsel

Robert Knop, General Counsel

David Adkins, General Counsel

Amy Rothstein, General Counsel

P R O C E E D I N G S

CHAIRMAN MCGAHN: All right. Next up, Draft Advisory Opinion 2008-15 submitted by National Right to Life Committee, Inc.

Do we have any other late-submitted documents we need to--

UNIDENTIFIED MALE SPEAKER: Yes, Mr. Chairman. We'd move for the sustention of the attorney's--provision for the attorney's submission of documents to consider, Agenda Document Number 08-32 and Agenda Document 08-32A.

CHAIRMAN MCGAHN: Without objection, so ordered.

MR. ADKINS: Good morning, Mr. Chairman, Commissioners. The two draft advisory opinions before you, Agenda Document 08-32 and Agenda Document 08-32A, respond to an Advisory Opinion request submitted on behalf of the National Right to Life Committee, Incorporated. The NRLC is a nonstock, 501c4 nonprofit which has produced two radio advertisements. The NRLC intends to broadcast these advertisements immediately and continuously throughout the United States leading up to the November 2008 general election. The two advertisements involve a dispute between the NRLC

1 and Senator Barack Obama over a vote that Senator
2 Obama cast as a member of the Illinois legislature
3 and specifically whether Senator Obama
4 mischaracterized that vote in subsequent
5 statements. The only difference between the two
6 advertisements is that the second advertisement
7 features a concluding sentence that reads, "Barack
8 Obama, a candidate whose words you can't believe
9 in." The committee asks whether the NRLC'S use of
10 general treasury funds to finance the broadcast of
11 the advertisements would constitute prohibitive
12 corporate expenditures or prohibitive
13 electioneering communications.

14 The first draft, Agenda Document 08-32,
15 concludes that the first advertisement does not
16 contain express advocacy and would be a
17 permissible corporate-funded electioneering
18 communication. Therefore, the NRLC would be able
19 to fund its broadcast with general treasury funds.

20 Regarding the second advertisement, the draft
21 concludes that the ad does contain express
22 advocacy, and therefore the NRLC's funding of its
23 broadcast with treasury funds would constitute a
24 prohibitive corporate expenditure.

25 By contrast, the second draft, which is

1 Agenda Document 08-32A, or revised Draft B,
2 concludes that neither advertisement is an
3 impermissible electioneering communication or
4 contains express advocacy. Therefore, the NRLC
5 would be able to use treasury funds to finance the
6 broadcast of both advertisements.

7 However, we received two comments on the
8 drafts, specifically the first draft, and one
9 comment on the request. So I'm happy to address
10 any questions you may have. Thanks.

11 CHAIRMAN MCGAHN: Thank you. First, I'd like
12 to thank Mr. Adkins for his work on this.
13 Whenever we get anywhere near the history of the
14 agency on issues that involve interpreting Supreme
15 Court cases is a very challenging area. And the
16 herding of the cats here has taken up a lot of
17 time, and I appreciate the effort and various
18 drafts and--and helping all the commission with
19 their thinking on this.

20 Two drafts and on the first ad, my sense is
21 there's some agreement at least as to the
22 conclusion. And then there's a difference on
23 the--whether mentioning--whether putting that
24 extra line in the ad changes the ad. Given that
25 Draft B is from me, it's pretty clear where I

1 stand, but the thing about this is it's an AO
2 request, and it's a rather targeted request, and
3 it certainly is a request designed to put a tough
4 issue in front of the commission. This is not an
5 easy case. These were ads written in a way to
6 probably raise a lot of issues. In a lot of ways
7 this is a law school exam on the meaning of the
8 Wisconsin Right to Life test. And--and, you know,
9 it's tough as an agency to look at test cases
10 because they always raise issues that may not
11 otherwise be raised, but that's the beauty of the
12 AO process. We still have to try to answer the
13 questions as best we can. Any comments, thoughts,
14 motions? Ms. Weintraub?

15 COMMISSIONER WEINTRAUB: Thank you,
16 Mr. Chairman. I support the other draft. We
17 didn't originally have two drafts, so they're
18 not--one of them doesn't have a letter, and the
19 other one is just Draft B. I support the
20 unlettered Agenda Document, 08-32. I think that
21 it is most consistent with the Wisconsin Right to
22 Life decision, with our regulation implementing
23 the Wisconsin Right to Life decision, with our--
24 with the arguments that this agency has made in
25 court subsequent to that regulation, and the

1 Wisconsin Right to Life decision, and with the
2 responses that we've gotten back from the court
3 on--from lower courts on that regulation and on
4 interpretations of it. I know a lot of people
5 preferred the magic word test, and, you know,
6 there were a lot of serious, respected people who
7 for many years thought that was the end point of
8 under the constitution of what could be regulated
9 was magic words. But in the McConnell case the
10 Supreme Court said that that test is functionally
11 meaningless and expanded into the area of
12 functional equivalent of express advocacy.

13 When we got to the Wisconsin Right to Life
14 case, the court said, an ad is a functional
15 equivalent of express advocacy only if the ad is
16 susceptible of no reasonable interpretation other
17 than as an appeal to vote for or against a
18 specific candidate. Under this test, WRTL's three
19 ads are plainly not the functional equivalent of
20 express advocacy. First, their content is
21 consistent with that of a genuine issue ad: The
22 ads focus on a legislative issue, take a position
23 on the issue, exhort the public to adopt that
24 position, and urge the public to contact public
25 officials with respect to the matter.

1 And I'll just interrupt the quote at this
2 point to point out that the ad in this case--I
3 suppose it focuses on a legislative issue. It's a
4 past legislative issue. It's a vote that was
5 taken in the state senate in, I think, 2000, but
6 it is--it does generally pertain to the issue of
7 abortion, which clearly is an ongoing public
8 policy concern that, you know, people get very
9 animated about, and it's very important to a lot
10 of people. So I'm, you know, not trying to read
11 this too narrowly. The ad takes a position on--
12 certainly on the vote on that issue. Doesn't
13 really exhort the public to adopt that position or
14 urge the public to contact public officials with
15 respect to the matter. So it's not clear out of
16 the four factors that the court mentioned as being
17 consistent with that of a genuine issue ad. At
18 least two of them are clearly missing from this
19 ad.

20 Second, going back to the quote, their
21 content lacks indicia of express advocacy: The
22 ads do not mention an election candidacy,
23 political party or challenger, and they do not
24 take a position on the candidate's character,
25 qualifications, or fitness for office.

1 Now, those factors, those two factors, I
2 think, are clearly evident. The indicia of
3 express advocacy, in the ad--in the second ad
4 which has the tag line--let me find it--"Barack
5 Obama, a candidate whose word you can't believe
6 in."

7 A candidate, mentions that he's a candidate
8 and says that his word can't be believed in. In
9 the--in a recent case that we litigated, "The Real
10 Truth About Obama,"--there were some counsel who
11 has filed the request today--we had a couple of
12 other ads where the tag line was in one case, "Now
13 you know the real truth about Obama's Position on
14 abortion. Is this the change you can believe in?"
15 The commission took the position that that was not
16 express advocacy.

17 The second ad had the tag line, "Obama's
18 Callousness,"--and I'm going to put in a dot, dot,
19 dot because the rest--there's a part in the middle
20 that doesn't really go to the legal issue--Obama's
21 callousness reveals a lack of character and
22 compassion that should give everyone pause.

23 Should give everyone pause was enough for
24 this commission to go into court and argue that
25 that's express advocacy.

1 Now, the really interesting thing to me
2 about, "The Real Truth About Obama" case is that
3 the decision we got back from the Eastern District
4 of Virginia, not normally a place where one finds
5 really liberal interpretations of campaign finance
6 laws, was that both of these ads were express
7 advocacy; that both of them met the no-other-
8 reasonable-interpretation test under Wisconsin
9 Right to Life.

10 I was stunned and gratified by that because
11 that actually had been my position all along, but,
12 you know, I didn't expect them to agree with me.

13 But if you look at those two tag lines and
14 say, well, that's express advocacy, I think it's
15 really hard to come back and say a candidate whose
16 word you can't believe in doesn't make the cut.
17 As I said, either under the direct words of
18 Wisconsin Right to Life or under our regulation,
19 which the court in "Real Truth About Obama" said,
20 you know, was a pretty close matchup to the
21 court's opinion. It pretty much endorsed our
22 regulation as an accurate and precise reflection
23 of the Supreme Court's view.

24 Now, I recognize that the other draft does
25 attempt to proffer some other explanations for

1 what was going on in that second ad. There are--
2 let's see. Am I on the right draft here? There
3 are, I think, four different proposed--let's see--
4 one, two, three, four--five different proposed
5 interpretations of the ad, none of which go to the
6 tag line, which is, of course, the difference
7 between the two ads. That's why I thought the
8 first draft, the unnumbered--unlettered draft that
9 I support was a good, narrow interpretation of
10 Wisconsin Right to Life and our regulation because
11 even though the ad, I think, does clearly go to
12 Senator Obama's character, without that tag line I
13 think it doesn't quite cross over the line that--
14 the very high bar that the Supreme Court set for
15 us in Wisconsin Right to Life. And as I said, the
16 alternative explanations for even the second ad in
17 the--in Draft B don't address that--that tag line.
18 What the draft does go on to say is that just
19 merely referencing Senator Obama as a candidate
20 doesn't convert the ad into an appeal to vote.
21 Maybe that's true, but in some hypothetical
22 context one could call somebody a candidate
23 without it being an appeal to vote for or against,
24 but there's no other explanation offered as to why
25 that word, candidate, is in there otherwise. What

1 else does it mean other than here's a candidate;
2 somebody is running for election that you can't
3 trust? What would any normal person do with that
4 information? They would say, well, gee, I don't
5 want to vote for somebody I can't trust, whose
6 word I can't believe in.

7 The draft goes on to say that the ad, even
8 the second ad doesn't comment on his--Senator
9 Obama's fitness or qualifications for office.

10 On the contrary, it takes issue with Senator
11 Obama's candor with respect to statements
12 supposedly made by the senator about requester;
13 hence, the ad does not say that Senator Obama is a
14 candidate you can't believe in, but instead
15 remains focused on what he supposedly said; thus
16 stating that he's a candidate whose word you can't
17 believe in with respect to what he said about
18 requester. And I have to say I cannot find the
19 legal difference or even the factual difference
20 between those two statements; that he's a
21 candidate you can't believe in as opposed to a
22 candidate whose word you can't believe in because
23 he's not doing mime out there on the campaign
24 trail. He's using words. If you can't believe
25 his words, what is it that you could believe about

1 this guy?

2 And it's interesting to me--and I don't know;
3 maybe this is inadvertent--that the draft says--it
4 doesn't comment on his fitness or qualifications
5 for office, but it leaves out the word, character,
6 which is in both the Supreme Court test and in our
7 regulation. And I think character is really the
8 key to this because when you say somebody's word
9 can't be believed in, that's a very direct attack
10 on character. You know, you say somebody's word
11 can't be believed in? In some parts of the
12 country there is fightin' words.

13 And certainly, when I try and teach my
14 children about what it takes to be a person of
15 good character, what traits they ought to be
16 adopting, honesty and integrity and
17 trustworthiness and having a word that people can
18 believe in are really high on my list of good
19 character traits. And I'm--I'm willing to bet
20 that the other parents on this panel teach their
21 kids the same thing. This does go directly to
22 character. To say that a candidate is--someone
23 who is a candidate whose word you can't believe
24 in, I just don't think there's any reasonable
25 interpretation of those words other than don't

1 vote for this guy. And it's not clear to me
2 actually whether if the ad said don't vote for him
3 because he's a candidate whose word you can't
4 believe in, if that would be enough for my
5 colleagues to say, that makes the ad express
6 advocacy; or whether they would still say, well,
7 there's all this issue talk in there, and that
8 kind of outweighs the even magic words in the
9 context of this ad. I'm not really sure what the
10 end point is of that analysis. I just--I just
11 don't think it's--it's reasonable. I don't think,
12 again, if--if--again, looking to the more
13 conservative of the two ads in, "The Real Truth
14 About Obama," if Obama's callousness reveals a
15 lack of character and compassion, that should give
16 everyone pause is enough to trip the express
17 advocacy standard, I don't see how saying that
18 he's a candidate whose word you can't believe in
19 could possibly be anything other than urging
20 somebody--urging anybody who hears this to--to
21 vote against him. And indeed, the fact that he
22 came in here and said, I want a 20-day AO even
23 though I'm not entitled to it, and I really
24 wanted--my colleagues know I really did try to get
25 an answer as quickly as possible on this. I

1 wanted to answer his question quickly because I
2 always assumed that these ads were all about the
3 election. You wouldn't need a 20-day AO if it was
4 just an issue ad, and he wasn't seeking to affect
5 the election. The reason that he needed to--was
6 urging us to get him an answer quickly, I think,
7 is because the election is coming up. And I
8 think, you know, it would be better if we could
9 have answered even quicker and even better if we
10 could agree on the result; although, I'm not--I'm
11 not optimistic.

12 So for all of those reasons I support the
13 first draft, the unlettered draft, and not Draft
14 B. And I would be happy to move Draft--Draft
15 Unlettered--it's very confusing; sorry--Draft
16 08-32 at the appropriate time, or we could have
17 further discussion, whatever my colleagues prefer.

18 CHAIRMAN MCGAHN: The problem I have with the
19 unlettered draft is--well, essentially the flip
20 side of the same coin that Commissioner Weintraub
21 raised, page 8, lines 13 through 19, when we get
22 into referencing Senator Obama as a candidate,
23 significantly alters the tone of the
24 advertisement, focussing it as much on Senator
25 Obama's bid for the Presidency as his actions as a

1 state legislator.

2 Additionally, the advertisement manipulates
3 Senator Obama's campaign slogan, "Change We Can
4 Believe In" to attack his character and call into
5 question his trustworthiness as a candidate whose
6 word you can't believe in. The idea that the tone
7 of the ad is now the standard to me is not a
8 standard at all, and I think this ends up
9 devolving into sort of an ink blot test kind of
10 thing where you either see the vase or the two
11 people talking to each other; and once you see one
12 or the other, you're never going to see the other.
13 To me the issue is whether or not you can read an
14 ad as something other than an appeal to vote, and
15 I think that both ads you can. Merely because you
16 mention that someone is a candidate doesn't
17 convert the ad into something other than--it
18 doesn't convert that into an appeal to vote or
19 preclude reading it as something other than an
20 appeal to vote. Simply because they want an
21 answer before the election that somehow we're
22 going to read some inference into this being
23 therefore the functional equivalent of express
24 advocacy to me is a farfetched argument because
25 folks who want to run issue ads tend to use the

1 campaign cycle as the vehicle to bring their issue
2 to the public attention because, well, that's when
3 the most people are paying attention. You're not
4 necessarily going to run an issue ad on an issue
5 of public in court, you know, the second week of
6 January or something. I mean, you may run it
7 during the Super Bowl; but you run it during
8 election season, and that's when folks have the
9 most opportunity to be heard. So, of course,
10 they're going to use it.

11 And then as far as the issue being a past
12 legislative issue, the issue that is coming up
13 apparently constantly all across the country in
14 state legislatures, when I first read the ad, I
15 thought, well, okay, these folks are Right-to-Life
16 folks who 365 days a year care about their issue
17 set, and now they've found a vote from a current
18 candidate that illustrates their issue; and they
19 have been called liars, I guess, and they want to
20 essentially defend themselves. They want to make
21 the point that this fellow is a candidate who what
22 he says about is you can't believe in. And that's
23 how I read the ad originally, and that's how I
24 still read the ad.

25 And it just goes back to what I said

1 initially. This is a tough case because these are
2 essentially a test case. They're very carefully
3 scripted ads. But when we get into those sorts of
4 ads, it does become tough. And, you know, when
5 you get into the tone of the ad and factors and
6 that kind of thing, I just don't see that as--as
7 something that provides a sort of bright-line rule
8 that the Supreme Court thought they were doing in
9 the Wisconsin Right to Life.

10 Since it was raised--I wasn't going to raise
11 it, but "The Real Truth About Obama" litigation,
12 the end of the opinion, the court says that
13 plaintiff is free to disseminate their message and
14 make any expenditures they wish. And so, you
15 know, it seems--it seems like we may even disagree
16 over what that district court said or didn't say.

17 With that being said, I mean, this is--I read
18 the Wisconsin Right test as a rather simple
19 bright-line test. And if you can--if you can read
20 the ad as something other than an appeal to vote,
21 that sort of begins and ends the analysis. And in
22 fact, you can't really export the other--the other
23 analyses without the full--the full package goods
24 of the Wisconsin Right to Life; and in close calls
25 the tie goes in favor of the speaker and all that

1 sort of thing. And to me I've tried to offer a
2 variety of other reads of the ad. And whether or
3 not they're reasonable or unreasonable, have that
4 debate, that devolves into an issue of fact, and I
5 don't read this as a fact issue. I read this as
6 an issue of law; and hence, that's why I support
7 Draft B.

8 Other comments?

9 COMMISSIONER PETERSEN: I'll just add briefly
10 that I, too, interpret the Chief Justice's test
11 that he set forth in Wisconsin Right to Life as
12 setting a very high bar with regard to which kinds
13 of ads may be subjected to BCRA'S prohibition
14 against corporate or labor-funded electioneering
15 communications. I mean, as has been said already,
16 Chief Justice Roberts said in that case, "The
17 Court should find that an ad is the functional
18 equivalent of express advocacy only if the ad is
19 susceptible of no reasonable interpretation other
20 than in its appeal to vote for or against a
21 specific candidate. The test contemplates that
22 there may be close calls as we--as--and I agree
23 with the chairman that this was crafted in a way
24 to be a close call. And--but the tests set forth
25 by the chief justice contemplates those close

1 calls; that you could have situations where two
2 people who are reasonable, one could interpret it
3 as being the functional equivalent of express
4 advocacy. The other one could think of it as
5 issue advocacy. And he said when that happens,
6 the tie goes to the speaker and not the sensor.
7 So the way I--again, I look at that test as
8 setting a very high standard. And as the draft--
9 Draft B shows, there are a number of reasonable
10 interpretations other than as appeals to vote when
11 you look at those ads that were proposed by the
12 requester in this case. And for that reason I'll
13 be supporting Draft B.

14 COMMISSIONER HUNTER: Mr. Chairman, thank
15 you. I support the comments of the chairman and
16 Commissioner Petersen. Today a non-for-profit
17 corporation, the National Right to Life Committee,
18 would like to exercise its First Amendment rights
19 by running two radio ads 60 days before a general
20 election regarding an issue that's at the core of
21 its mission. BCRA states that a corporation may
22 not pay for advertisements that mention a
23 candidate within 60 days of the general election.
24 National Right to Life can attempt to ensure that
25 the speech doesn't cross the line by expressly

1 advocating the election or defeat of a specific
2 candidate, by analyzing case law, the statute, and
3 FEC regulations; but if they get it wrong, it's a
4 potential federal crime.

5 In this case the National Right to Life
6 Committee decided to file an advisory opinion, and
7 we are in the unenviable position of determining
8 whether an ad should be afforded the protection of
9 the First Amendment. In June of '07 the Supreme
10 Court decided the Wisconsin Right to Life
11 decision, which we have talked about today, and
12 held that the relevant section of BCRA
13 unconstitutional as applied to issue ads that a
14 not-for-profit corporation wanted to air within 30
15 days of a primary election. So very similar facts
16 to the Wisconsin Right to Life decision are before
17 us today, both non-for-profit corporations. Both
18 would like to air ads within the relevant time
19 period before the relevant electorate.

20 The Supreme Court found that an ad is the
21 functional equivalent of express advocacy only if
22 the ad is susceptible of no reasonable
23 interpretation other than as an appeal to vote for
24 or against a specific candidate.

25 As has been noted today, Draft B notes that

1 there are several other reasonable interpretations
2 other than of an appeal to vote.

3 In drawing the line between campaign advocacy
4 and issue advocacy, the First Amendment requires
5 us to err on the side of protecting political
6 speech rather than suppressing it. I will support
7 Draft B because I believe neither ad before us
8 today is the functional equivalent of express
9 advocacy under an analysis of the Supreme Court
10 precedent or FEC regulations. Thank you.

11 CHAIRMAN MCGAHN: Ms. Weintraub again.

12 COMMISSIONER WEINTRAUB: Thank you,
13 Mr. Chairman. I don't want to short-circuit
14 anybody else who wants to talk. I just wanted to
15 respond very briefly to a couple of comments that
16 you made. It's true that the "Real Truth About
17 Obama" decision says that the plaintiff is free to
18 disseminate their message and make any
19 expenditures they wish. The next sentence reads,
20 "Their only limitation is on contributions based
21 on constitutionally permitted restrictions." And
22 that's always the case when we have to decide.
23 Nobody is ever forbidden from speaking. The
24 question is what kind of money can you use, and
25 are there going to be any disclosure

1 ramifications. So I don't--

2 CHAIRMAN MCGAHN: Well, if I could just--

3 COMMISSIONER WEINTRAUB: Sure.

4 CHAIRMAN MCGAHN: So if a corporation--if a
5 corporation would be banned from speaking, and
6 this is a nonprofit entity giving us an Advisory
7 Opinion request--they're a 501c4; they're not an
8 MCFL accepted, so they are prohibited from
9 speaking.

10 COMMISSIONER WEINTRAUB: Many organizations--
11 I'm not--in fact, I'm pretty sure this one does,
12 too--many 501c4's in that position have a PAC, and
13 they fund these kinds of communications through
14 their PAC. And I believe this one is one of
15 those, so, again, it goes to funding.

16 CHAIRMAN MCGAHN: We agree that the C-4 is a
17 separate entity from a PAC?

18 COMMISSIONER WEINTRAUB: Yeah.

19 CHAIRMAN MCGAHN: Okay. So the C-4 is
20 banned.

21 COMMISSIONER WEINTRAUB: The C-4 can't do it
22 out of their C-4 account. They can do it out of
23 their PAC.

24 The only other point that I wanted to make is
25 that I hear what you're saying about words like

1 "tone" and "factors," and I would be happy to
2 strip all that language out and just go by a
3 straight meeting of the words if that would gain
4 any votes on the other side. I'm not optimistic
5 that it would, but I--I'm happy to make the offer.

6 CHAIRMAN MCGAHN: I still struggle, though,
7 with this. We have a requester who is a
8 candidate--or who alleges that a candidate for
9 national office called them a liar. And we're not
10 going to get into what the truth or--I mean, the
11 requester included all kinds of backup for the ad;
12 and, you know, for purposes of this, I think you
13 just take everybody at their word for the purposes
14 of the AO. We don't need to get into whether or
15 not who is winning the name-calling contest, but
16 from a pulpit he wouldn't have had if he wasn't
17 running for president. So my view is we shouldn't
18 foreclose a nonprofit from defending itself in the
19 same arena, which is his candidacy. I mean, if
20 they want to comment at a time--and to me they
21 throw out the word, candidate, not only--and I
22 don't think--obviously, when you mention the word,
23 candidacy, it has something to do with the
24 election, right? But to me, that's not the only
25 reason why they put in the word, candidate. It's

1 another reason not to believe what he's saying
2 because here's a situation where the candidate is
3 saying something about a grass-roots nonprofit
4 group, and they want to say, well, is he a
5 candidate whose words you can't believe in? And
6 the word is that--what he said about this
7 nonprofit is the way I read it. And I'm not so
8 sure stripping out the tone language still changes
9 the end result. If the tag line had said that--
10 said a politician whose words you can't believe
11 in, would that change your view?

12 COMMISSIONER WEINTRAUB: I'm not sure. That
13 is a much closer call. I'd have to go back and
14 look at the regulation again and see what--

15 CHAIRMAN MCGAHN: Okay. Well, let's take a
16 look.

17 COMMISSIONER WEINTRAUB: It says, "Mentioned
18 an election, candidacy, political party, opposing
19 candidate or voting by the general public."

20 Maybe. I'd want it--I'd want to give it more
21 than 10-seconds thought.

22 CHAIRMAN MCGAHN: So maybe if they changed
23 that one word, that could--

24 COMMISSIONER WEINTRAUB: But you still have
25 the--the very direct attack on character. So like

1 I said, I'd want to give it more than 10-seconds
2 thought here at the table.

3 CHAIRMAN MCGAHN: Okay. So these are not as
4 easy calls as some maybe would think. One word
5 here and there can make a difference in these ads.
6 But in any event, Vice Chair is looking at the
7 regs as well.

8 VICE CHAIRMAN WALTHER: We all have looked at
9 our regs off and on. I want to say this. I'm
10 probably the most conservative approach on this
11 one because I don't--to me, the added sentence in
12 the second example doesn't make such a difference.
13 In my own mind it makes one express advocacy, and
14 the other one not. Everyone knows Obama is a
15 candidate, so it's not really an issue. And even
16 if it were an issue, I mean, even under Roberts'
17 opinion there are minor things that can be
18 identified and clarified, or interpretation can be
19 developed through discovery. The whole idea, as I
20 understand it, is that we don't want to be able to
21 prevent free speech by engaging in protracted
22 litigation, and then delay is what prevents it.
23 But there is not a restriction even engaging in
24 minor litigation which could clarify enough so
25 that a decision could be made fairly quickly.

1 And I think when you look at this, then the
2 next question is whose word you can't believe in.
3 Well, if you read one, you can argue that perhaps
4 Obama could redeem himself if he made an apology.
5 But when you look at what's really the message
6 here is the public would know about his extreme
7 position that he opposed very defining every baby
8 born alive after an abortion as deserving a
9 protection; that what we're talking about is
10 trying to convey that Senator Obama holds this
11 position. It's unacceptable; and in addition,
12 he's not telling the truth. And I really think at
13 this particular point we find enough in it so that
14 it appears an express advocacy; one is as well.

15 Because we're in litigation, however, I think
16 my remarks are minor. I'm inclined to just make
17 them as truncated as possible because in getting
18 this interpreted in the next round of our
19 litigation.

20 CHAIRMAN MCGAHN: Certainly agree.

21 Ms. Bauerly?

22 COMMISSIONER BAUERLY: Thank you,
23 Mr. Chairman. I share many of Commissioner
24 Weintraub and a certain amount of Commissioner
25 Walther's concerns about this draft as well. I'll

1 support Draft A because I believe it's consistent
2 with our regulations and Supreme Court law.

3 And some of--just some of my concerns about
4 Draft B include that I agree the Supreme Court set
5 a very high bar, and I think that the commission
6 went back and wrote a regulation consistent with
7 that stringent test. And we could, you know,
8 disagree whether that's the right test or the
9 wrong test, but that's, you know, frankly not our
10 role. But the Supreme Court did give us some
11 guidance about how to interpret its tests, and in
12 my view Draft B doesn't fully take account of what
13 I think are important guidants--guiding factors
14 that are directly applicable here. The Supreme
15 Court talks about indicia of express advocacy
16 including mentioning an election or a candidate
17 and an attack on character. And I don't have
18 children, but I agree with you. My mother taught
19 me that telling the truth was an important thing.

20 So those are my concerns with Draft B, and so
21 I will be supporting Draft A, or the unlettered
22 draft as we refer to it.

23 COMMISSIONER WEINTRAUB: Make a motion?

24 CHAIRMAN MCGAHN: Time for a motion.

25 COMMISSIONER WEINTRAUB: All right,

1 Mr. Chairman. I move approval of Agenda Document
2 Number 08-32. That's the one without the letter.

3 CHAIRMAN MCGAHN: That's the unlettered.

4 COMMISSIONER WEINTRAUB: The unlettered one.

5 CHAIRMAN MCGAHN: Even though we have a Draft
6 B, we don't have a Draft A, so that would be
7 Pseudo A. On that motion all in favor say aye.

8 VICE CHAIRMAN WALTHER: May I comment before
9 we vote?

10 CHAIRMAN MCGAHN: Sure.

11 VICE CHAIRMAN WALTHER: I would just like to
12 say I would support the portion of the motion that
13 relates to question number 2, but not with respect
14 to question number 1; so I'll be voting against
15 it.

16 And I also do have problems with the use of
17 the word, tone. I think that's not the message or
18 really the appropriate one to make this decision
19 on.

20 CHAIRMAN MCGAHN: Okay. All in favor of the
21 motion say aye.

22 COMMISSIONER WEINTRAUB: Let me just throw in
23 one more thought, and that is that I appreciate
24 the vice chairman's comments. That's why I think
25 this is the compromised draft because it says one

1 is, and one isn't express advocacy. I'm finished
2 now.

3 CHAIRMAN MCGAHN: Okay. We can vote now?

4 COMMISSIONER WEINTRAUB: Yeah.

5 CHAIRMAN MCGAHN: We're all set?

6 COMMISSIONER WEINTRAUB: Yeah.

7 CHAIRMAN MCGAHN: Okay. I'm just looking
8 both ways before I cross the street here. Okay.
9 All in favor say aye.

10 COMMISSIONER WEINTRAUB: Aye.

11 CHAIRMAN MCGAHN: All opposed?

12 (MEMBERS VOTE NO)

13 CHAIRMAN MCGAHN: That motion fails 2 to 4
14 with Commissioners Weintraub and Bauerly voting in
15 favor, the remainder voting in opposition for
16 apparently different reasons.

17 Any other motions?

18 UNIDENTIFIED MALE SPEAKER: Mr. Chairman, I
19 would move that we approve Agenda Document Number
20 08-32-A, otherwise known as Draft B.

21 CHAIRMAN MCGAHN: All in favor say aye.

22 (MEMBERS VOTE AYE)

23 CHAIRMAN MCGAHN: All opposed?

24 (MEMBERS VOTE NO)

25 CHAIRMAN MCGAHN: That motion fails 3-3 with

1 myself, Commissioner Petersen and Hunter voting in
2 favor; Vice Chair, Commissioner Bauerly and
3 Commissioner Weintraub voting in opposition. My
4 sense is we have consensus; however, where five of
5 us agree that the first ad--and I don't have the
6 questions in front of me, so I don't want to say.
7 Depending how you frame the question, do we have
8 the okay for the c4 to run, I think, is the best
9 way; and the second, we don't have consensus. So
10 maybe the best thing to do at this point is ask
11 the counsel to prepare a draft that reflects the
12 common areas where we have in five on the first ad
13 and then unable to reach a conclusion on the--with
14 respect to the second ad. I think that's an
15 accurate representation of the views up here. If
16 it's not--yes.

17 COMMISSIONER WEINTRAUB: I just want to say
18 to you what I've already said to one or two of
19 your colleagues, and that is that I'm not--I
20 haven't decided yet whether I would vote for that
21 answer. In part, it depends on the legal
22 rationale, but in part I wasn't actually kidding
23 that I thought Draft A was a compromise. And I'm
24 not sure that I'm willing to say, you know, just
25 to give the permission without the complementary

1 restriction on the other ad. So I'm just--I'm
2 continuing to ponder, and it will depend on the
3 wording of the draft.

4 CHAIRMAN MCGAHN: Do we have any management
5 administrative matters?

6 UNIDENTIFIED MALE SPEAKER: We do not.

7 CHAIRMAN MCGAHN: Okay. Anything else for
8 the good of the order?

9 Okay. With that, we will adjourn our open
10 session. Thank you.

11 (MEETING ADJOURNED)

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1 STATE OF INDIANA)
2) SS:
3 COUNTY OF VIGO)

4 I, Renee R. Dobson, a Notary Public in and for
5 said county and state, do hereby certify that I listened to
6 the audiotape recording of a meeting;

7 That said meeting was taken down in Stenograph
8 notes and afterwards reduced to typewriting under my
9 direction; and that the typewritten transcript is a true and
10 accurate record of said meeting;

11 I do further certify that I am a disinterested
12 person in this matter; that I am not a relative or attorney
13 of any of the parties, or otherwise interested in the event
14 of this matter, and am not in the employ of the parties.

15 IN WITNESS WHEREFORE, I have hereunto set my hand
16 and affixed my notarial seal this 13th day of
17 November, 2008.

18 My Commission Expires:
19 September 6, 2015

Renee R. Dobson RMR
Renee R. Dobson, Notary Public,
Residing in Vigo County, Indiana

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